Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-960

In The
Supreme Court of the United States
October Term, 1986

HIGH TIDE SEAFOODS, ET AL.,
Appellants,
v.
STATE OF WASHINGTON, ET AL.,
Appellees.

On Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

Washington argues that the issues presented by High Tide are not substantial. Yet its arguments demonstrate precisely the opposite.

1. Washington asserts that the Washington Supreme Court "applied existing Indian Commerce Clause standards and did so correctly." Motion to Dismiss or Affirm (MDA) at 9. That is *not* what the Washington Supreme Court said it did. That Court said that "no clear and precise modern test for the validity of taxes affecting Indian commerce has been articulated by the United States Supreme Court," App. 10, and then proceeded to conduct its analysis on the basis of this Court's decisions applying the Interstate Commerce Clause, App. 11. The standards under the two Clauses are entirely different. Jurisdictional Statement (JS) at 14-15.

2. Washington also contends that *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980), is dispositive and that the other Indian cases are distinguishable. MDA at 9 and 12 n.11. But the Washington Supreme Court did not consider the other Indian cases and only cited *Colville* for the undisputed proposition that the Indian Commerce Clause "does not bar all state taxation of matters touching the economic interests of Indian tribes . . ." App. 11. As Washington implicitly recognizes, whether its challenged fish tax is more similar to the cigarette tax upheld in *Colville* or to the state taxes and fees struck down in this Court's more recent Indian decisions is the core question presented in this case. That question was not addressed by the Washington Supreme Court and obviously is substantial. Indeed, viewed from that perspective,

the Washington Supreme Court's decision is clearly erroneous and should be summarily reversed.[1]

3. Washington now argues that the adverse economic effects of its tax on treaty Indian fishermen have not been established. MDA at 2-3, 11. That was not its position before the Washington Supreme Court. That Court adopted the State's premise that "the purchaser may pass part or all of the tax burden to the nontaxable fisherman." App. 12, and then held that that was permissible so long as the legal incidence of the tax was imposed on the fish purchaser, App. 11. Having successfully urged the Washington Supreme Court to assume that the economic burden of the challenged tax falls at least partially on nontaxable treaty Indian fishermen, Washington is now in the peculiar position of undermining the theory on which it has heretofore prevailed.

4. Washington seeks to justify its tax by going outside the record to claim that treaty Indian fishermen bene-

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[1] The basis of the *Colville* holding was that the sale of cigarettes to non-resident, non-Indians at tribal smokeshops was an effort to market a tax exemption and "that the value marketed by the smokeshops . . . is not generated on the reservations by activities in which the Tribes have a significant interest." 447 U.S. at 155. By contrast, the sale of fish caught by Indian fishermen exercising their treaty rights is an activity in which tribes have a significant interest and to which they contribute all of its value. *See e.g.*, Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979); Tulee v. Washington, 315 U.S. 681 (1942). It is clearly more analogous to the state taxes and fees on the harvesting of reservation timber, the construction of an Indian school and the taking of reservation fish and wildlife which were held to be preempted in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Bd. Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); and New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

fit from the challenged tax. MDA at 3-4, *citing United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, — U.S. —; MDA at 12 n.11. Washington neglects to mention, however, that tribes operate and maintain their own hatcheries which benefit both Indians and non-Indians. *See* 759 F.2d at 1359. The tribes' efforts to enhance the overall fishery and to provide other essential services to their members are thwarted by Washington's challenged tax which leaves no room for tribal taxes on one of the tribes' only available sources of revenue. *See* Puyallup Tribe's Amicus Curiae Brief at 5.

5. Washington concedes High Tide's standing to challenge the tax as a violation of the Indian Commerce Clause. But it argues that that analysis must be undertaken without regard to the underlying treaty right to take fish. MDA at 6-7.[2] High Tide is not aware of any decision of this Court holding that a litigant cannot make an argument encompassed within an issue that it has standing to raise.

The Washington Supreme Court denied High Tide standing to raise the treaty right issue because of its prudential concern that High Tide "will not be able to prove their [sic] injury falls within the zone of the fishing rights of treaty Indians." App. 8. That Court did not hold that High Tide lacks constitutional standing to raise the treaty

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[2] The lack of merit in Washington's position is manifest when it is considered that the treaty guarantees and protects the right to take fish for *commercial* purposes. Washington v. Fishing Vessel Ass'n., *supra*, 443 U.S. at 665 n.6, 688. As such, it is subject to the protection of the Indian Commerce Clause. *Cf.* McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 172 n.7, 173-175 (1973).

fishing right issue. *See Allen v. Wright,* 468 U.S. 737, 751-752 (1984). Accordingly, High Tide addressed the prudential concern in its Jurisdictional Statement, arguing it has *jus tertii* standing to assert that the state fish tax violates Indian treaty fishing rights under this Court's decision in *Craig v. Boren,* 429 U.S. 190, 192-197 (1976). *See* JS at 12 n.3.

Washington did not respond to High Tide's assertion of *jus tertii* standing. Nor did it attempt to distinguish *Craig v. Boren.* At the very least, High Tide's standing to rely on the commercial fishing rights secured by treaties as part of its Indian Commerce Clause challenge to Washington's fish tax presents a substantial federal question which merits this Court's attention.

6. Finally, Washington argues that certain arguments made by High Tide in its Jurisdictional Statement are new and therefore should not be considered by this Court. MDA at 8.[3] The principal issue raised by High Tide from the outset of this litigation is that Washington's tax impermissibly burdens Indian commerce. The Washington Supreme Court specifically rejected that claim. App. 10-11. The arguments to which Washington objects are enlargements or refinements of that basic question.[4] They are

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[3] In particular, Washington objects to High Tide's arguments that the existence of tribal taxes must be taken into account in the Indian Commerce Clause analysis and that the State should be required to give credits for tribal taxes as it does for taxes paid to other states. See JS at 5-6, 19-22 and n.14.

[4] Viewed in context, High Tide's "new" contentions are responses to the rationale adopted by the Washington Supreme Court. They are part of the continuing refinement of issues that

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therefore properly before this Court. *Illinois v. Gates*, 462 U.S. 213, 217-220 (1983), *discussing Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

CONCLUSION

Washington's Brief succeeds only in demonstrating the deficiencies in the decision below and that the federal questions presented in this appear are indeed substantial.

Respectfully submitted,

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February, 1987

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almost always occurs as litigation progresses from one level to another in our multi-tied system. The opportunity for such refinement was limited in this case prior to the Washington Supreme Court's decision. There was no decision by Washington's intermediate Court of Appeals. JS at 9. The Thurston County Superior Court's decision is unreported and unrecorded. The two opinions issued by the Washington Department of Revenue, App. 14-18, are cursory. They do not mention the Indian Commerce Clause issue, presumably because "the Department of Revenue is without authority to declare an act of the legislature unconstitutional." App. 17.